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CURRENT TOPICS

A noticeable feature of Judge Henry's address to which we made recent allusion was his criticism of the practice of taking cases for contingent fees. A great deal of the criticism of judges is, the judge says, due to this habit. The attorneys are by force of such stipulations substantially parties to the suit. More, he has "the double interest of the party and attorney, and, smarting under his defeat, only gets the satisfaction for his labor derived from stalwart Anglo-Saxon denunciation of the court, to whose rulings he attributes his loss." "It were far better," says the judge, "for the bar and their clients and the courts, if the attorneys would adopt and inflexibly adhere to the rule of charging a reasonable, fixed compensation for their services, and let the clients take all the chances of the litigation. If this were the invariable practice, many cases which now find their way to appellate courts, would never be commenced in the lower courts, or would end there. And these are the cases in which attorneys most frequently unreasonably complain of the decisions of the appellate courts." These observations of the learned judge will bear careful consideration. There can be no doubt that the practice alluded to has many more unpleasant consequences than those mentioned by the judge. It encourages dishonest litigation, and, often, is an incentive to unprofessional conduct. It makes counsel desperate, oftentimes, and we all know the moral feelings of one in desperate straits. Still with all the disadvantages which may accrue to the public from the practice, there is one thing in its favor which has never been disproved, *i. e.* that it greatly assists the poor man in obtaining justice against wealthy, oppressive corporations, who would otherwise, by force of their bullying course, and possession of what the victims of their dereliction of duty have not, oblige them to seek no redress, or content themselves with a small proportion of their dues. Such a gain is so desirable that it may well be considered whether it does not overbalance the disadvantages of the practice. Of course Judge Henry is a judge of the Supreme Court; the attorneys sometimes rail at the court; the judge thinks that the practice is responsible in large measure for these stalwart attacks, and therefore uses some uncomplimentary expressions regarding it. "So long as truth endures," men will view things from their own standpoint. To do otherwise, would perhaps be contrary to nature. When the judge returns once more to the walks of the profession, and he listens once more to the piteous plaints of poor but honest victims of the wrongdoing of railroads, and cities and towns, he may change his views, and consent to prosecute the case "for fifty per cent. of the verdict."

What little we supposed we knew about the law of pleading had another shock when we scanned with astonished glance the many pointed decision of the sensitive West Virginia Court of Appeals in Davisson v. Ford. This court is unquestionably one of the ablest in the land. Its opinions exhibit great research, and the work of judicial minds. It feels its duty to the profession requires it to make a study of every case which comes before it, to the end that they may intelligently discuss it in every phase. That is the proper view to be taken by every conscientious court, but what we do object to, and what we have protested against heretofore, is the communication at length to the profession of all the details of the process by which the court reaches its conclusions. The bench is an able one; its conclusions are sound ones, and we have no fear when we challenge any man to produce a volume of decisions more calculated to withstand the test of impartial criticism than a single report of the Court of Appeals of West Virginia. We differed with them in regard to its course in the Frew and Hart contempt case; we entertain a different opinion from theirs in regard to the propriety of the habit of writing long opinions, but we can each have the conscientiousness of having our views framed honestly, and with no spirit of pandering to popular applause. We appreciate as fully as does anyone who wields an editorial pen, the confidence which the legal press should create in the professional mind for

the reliability of the bench; we know full well that all presumptions should be drawn in support of the conclusions and acts of judges, but when we meet with one which revolts against assumed knowledge of jurisprudence or ideas of right, we should consider it a cowardly surrender of our independence did we lie silently by, acquiesce therein, and thus permit an inference to be drawn that we recognized its propriety. A great lawyer in delivering an argument before a Supreme Court, one of the present judges of the Federal Supreme Court, then presiding, was interrupted by the latter after the statement of a legal proposition, with the reminder that "it was not law." With his accustomed dignity and independence, he drew himself up to a defiant position, and replied, "It was law until your honor spoke." The Court of Appeals of West Virginia, in the case first referred to, lays down the law to be that if in a suit against one on a contract, it appears by the proof at the trial, that the defendant jointly with another made the contract declared on, a verdict for the defense is proper. We will do more than the lawyer mentioned, and will say, "with all due deference to your honors, the contrary rule was law, until your honors spoke." We had learned in our earlier days from Chitty, Gould and Stephen that such an error was non-joinder; that non-joinder was an omission to be taken advantage of, by plea in abatement; when the non-joinder was of a proper defendant, that such objection was waived by plea to the action, and the trial on the merits should proceed as if the action had been properly brought. The statement to the contrary by so respectable a court cast doubt upon the reliability of our recollections, and we sought the faithful old books with the old time avidity. We found that our memory was still faithful, and we can suggest in the best spirit an amendment of the decision. The reason is plain. There is no variance between the allegation and the proof. The plaintiff alleged that the defendant made a contract. The defendant at the trial admits that he made it, but asserts that another made it with him. That is no denial. It admits all the plaintiff claims, though the plaintiff might have claimed more. The defendant might have asserted the omission in abatement, but when once the case is ready for trial, it is too late.

We meet occasionally with a very rich thing in the law, which, for the time, dispels all notions of its alleged dryness, but nothing within our recollection had about it the elements entitling it to a place among Mr. Heard's Legal Oddities as much as a case which came recently before the Superior Court of Montreal, which not long ago furnished us the train consultation suit. A sexton in a church on one Sunday when he had his feeling against one of the church members fully drawn, while wending his way around the temple with his occipetal covering wherein to gather the offerings of the faithful, contemptuously declined to seek the contribution of the member in question, to his great humiliation. The humiliated member sought reparation for this insult in the court referred to, and the court, holding that a wilful and marked omission to present the plate to a member of the congregation was sufficient to found an action, awarded "*le demandeur*" (the plaintiff) "*la somme de* $5 *courant.*" As we were obliged to hurry to press, we had not time to translate the decision from French to English, but those of our readers who are eager to translate it, can find it at length in 7 Legal News, 259, Lebeau v, Turcot.

LIABILITY OF AGENTS UPON UNSEALED, NON-NEGOTIABLE INSTRUMENTS.

Where a question arises as to whether a simple contract executed by an agent, should be considered binding upon him or his principal the decision must depend in the absence of extrinsic evidence, upon the expressed intention of the parties, and not upon the form in which the instrument is drawn or signed. If it appears from the language used, taking the instrument as a whole, that the intention was to bind the principal, then he is bound; if on the other hand the intention appears to have been to bind the agent personally, he should be considered the contracting party.[1] This general rule as to intention must be applied however in conjunction with the extremely

[1] Paice v. Walker, 5 L. R. Exch. 173; Rollins v. Phelps, 5 Minn. 463.

technical rule as to *descriptio personæ*. Whether an agent describes himself as "agent" and signs his individual name without addition,[2] or describes himself in the body of the instrument as the agent of a designated principal and also appends the word agent to his signature,[3] or simply appends the word "agent"[4] or agent of B,[5] or trustee,[6] or trustee of B to his signature, without describing himself as agent in the body of the instrument, the descriptive words are presumed in the absence of any other expressions indicative of an intention to act in a representative capacity, and of extrinsic evidence, to be intended to merely identify the transaction for the agent's convenience, or to identify him, and not to indicate any intention on his part to bind his principal or escape personal liability[7], unless he acts as a government agent or the agent of a public corporation. Such agents do not come within the general rule. On the contrary, where a public agent describes himself as such, in a contract entered into for the benefit of his principal, the presumption is that he does so to indicate that he does not intend to be personally bound, even though he signs his own name without addition.[8] The rule as to *descriptio personæ* is applied with great strictness to contracts entered into by guardians,[9] executors[10] and administrators,[11] on the ground that guardians have no authority to bind their principals and that executors and administrators have no principals. It seems necessary for them to state in the clearest manner that they do not intend to be personally bound, in order to avoid personal liability, except in New York where the courts are more inclined to look to the real intention of parties than to indulge in unwarranted and technical presumptions. In that State an instrument signed, "A, executor of B describing A in the caption as executor of B, and appearing on its face to be for the benefit of B's estate has been held not to bind A personally.

In delivering the opinion of the New York Court of Appeals upon the question there involved Judge Selden said:[12] "I am of opinion that where the contract itself is ostensibly made on behalf of the State, and relates exclusively to matters in which the executor or administrator has no personal interest, if the latter in making the contract describes himself as executor, etc., the presumption is that he intends to bind the estate and not himself." And though the rule as thus laid down is not supported by authority, it certainly is by reason.

The following are some of the extreme cases in which the rule as to *descriptio personæ* has been applied, viz.: Where a contract described the contracting party as "A. president and representing the B. Co." and was signed by A individually;[13] when a lease described the lessee as "A, representing B & Co., manager of the Opera Company" and was signed, "A representing B & Co.;"[14] where an instrument executed by the solicitors of A, B and C began, we, as solicitors of A, B and C, esquires, assignees of the estate and effects of D and C, do hereby undertake to pay E such rent as shall appear due to him from the said D;[15] when a contract signed by A and B individually described them in the caption as "A, and B acting as a committee of arrangement of the Italian Opera in the Academy of Music."[16]

2 Seaver v. Coburn, 10 Cush. 324; Fogg v. Virgin, 19 Me. 352.

3 Byington v. Simpson, 134 Mass. 145; Kenyon v. Williams, 19 Ind. 44; Winsor v. Briggs, 5 Cush. 210.

4 Harkins v. Edwards, 1 Ia. 426; *Contra* Rogers v. March, 33 Me. 106.

5 Fisk v. Eldridge, 12 Gray 474.

6 Cahokia v. Rautenberg, 88 Ill. 219.

7 Polk v. White, 78 Ky. 248; Chamberlain v. Pa. Wool Growing Co. 54 Cal. 103; Byington v. Simpson, 134 Mass. 145; Musser v. Johnson, 42 Mo. 74; Klosterman v. Loos, 58 Mo. 290; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Wilt v. Walon, 9 N. Y. 571; Hill v. Bannister, 8 Cowen, 31; Brockway v. Allen, 17 Wend. 40; *Contra* Dispatch line of Packets v. M. Co. & Trustees, 12 N. H. 205.

8 Macbeth v. Haldmand, 1 Term Rep. (Eng.) 172; Hodgson v. Dexter, 1 Cr. 345; Randall v. Van Vechten, 19 Johns, 61; Murray v. Carothers, 1 Met. (Ky.) 71; Sanborn v. Neal, 4 Minn. 126; Bingham v. Stewart, 14 Minn. 214; Allen v. Bareda, 7 Bos. (N. Y.) 204; Wallis v. Johnson School T. P. 75 Ind. 268; Andrews v. Estes, 11 Me. 267; Ghent v. Adams, 2 Ga. 214; Baker v. Chambles, 4 G. Greene (Ia.) 428; Duncan v. Niles, 32 Ill. 532; see also Powell v. Finch, 5 Yerg. 446.

9 Forster v. Fuller, 6 Mass. 58; Thatcher v. Dinsmore, 5 Mass. 299; Sperry v. Fanning, 80 Ill. 371; Whiting v. Dewey, 15 Pick. 428.

10 Rittenhouse v. Ammermann, 64 Mo. 197. See

11 Gregory v. Leigh, 33 Tex. 813; E. T. I. M. Co. v. Gaskill, 2 Lea. (Tenn.) 742; Mitchell v. Hazen, 4 Conn. 495; Belden v. Seymour, 8 Conn. 19.

12 Chouteau v. Suydam, 21 N. Y. 179.

13 Guernsey v. Cook, 117 Mass. 548.

14 Grau v. McVicker, 8 Biss. C. Ct. 13.

15 Burrell v. Jones, 3 B. & Ald. 1 (Eng. 47.)

16 Rowland v. Phelan, 1 Bos. (N. Y.) 43; See also Blakely v. Bennecke, 59 Mo. 193.

In all of these cases the agents have been held personally bound; in the last case was upon the ground that the committee did not appear from the instrument to have a principal who had any legal existence.

The rule as to *descriptio personæ* is contrary to both common experience and common sense and that fact has induced the courts to hold that though words describing a party to a contract as the agent or representative of another, are insufficient in themselves to indicate an intention to act as agent, they, nevertheless, whether the principal's name is stated[17] or not[18] render it somewhat uncertain whether the intention was to bind the agent or his principal, and warrant the admission of extrinsic evidence to remove the doubt.

And in several cases parol evidence has been held admissible in the absence of any ambiguity.[19]

In attempting to arrive at the true meaning of parties to a written instrument all its parts and all the expressions used should be taken together. The description of the contracting party as agent, trustee, or the like, or the failure to so describe him is of importance. If the instrument contains other evidence of an intention to act in a representative capacity, descriptive words lose their insignificance. If the principal is named in the body of the instrument as the contracting party, that fact is well nigh conclusive evidence of an intention to bind him alone.[20]

The language of the agreement on the agent's part is also important. If the agreement is made as agent or on behalf of the principal, the agent cannot be held liable upon it. Thus, where an instrument began, "we as trustees, but not individually, promise to pay," and was signed "A, B, trustees," it was held that the trustees were not personally bound.[21]

So where a sold note began "Sold on behalf of A," and was signed B, as agent, it was held the contract of A.[22] And the ruling was the same as to the agent's liability, where a bought note executed by a broker, beginning "I have this day sold you on account of A" was signed "B, Broker;"[23] where a contract executed by the trustees of a corporation stated on its face that it was executed by them "as trustees of the A Co.," and was signed by them as trustees;[24] and where a contract began "I will give" but afterwards used the pronoun "We" and was signed "A, agent of B."[25]

The fact that the agent has signed his own name does not seem to make him personally liable in such cases. Thus where a sold note drawn up by "A & Co.," began, "We have sold you on account of B," and was signed "A & Co.," it was held not to bind the company.[26] And where the words were "I hereby agree on behalf of A," the agent was held not bound, though he signed individually and without any addition to his name.[27] The signature should always be taken in connection with what precedes it. The fact that the thing to be done is in the line of the principal's business, has sometimes been considered of great importance. Thus where a contract concerning the construction of a drain mentioned A, B and C., directors of the E. R. Draining Association as party of the first part, and was signed "A, B, C, it was held that A, B and C, were not bound if the association was incorporated.[28] And where the thing to be done is to be performed by the principal that is of course, still stronger evidence of an intention to bind

17 Hardy v. Pilcher 57 Miss. 18; Klosterman v. Loos, 58 Mo. 290; Wake v. Hanop, 7, Jur. (Eng. N. S. part 1,) 710; Johnson v. Smith, 21 Conn. 627; Smith v. Alexander, 31 Mo. 193; Cleveland v. Stewart, 3 Ga. 283; Lacy v. Dubuque Lumber Co. 43 Ia. 510; Hovey v. Magill, 2 Conn. 680; Steams v. Allen 25 Hun. 550; Pratt v. Beaupre, 13 Minn. 187; Hood v. Hallenbck, 7 Hun. N. Y. 362; Davis v. Henderson, 25 Miss. 549; Thompson v. T. R. Co. 36 Barb. 79; Greene v. Kopke 18 C. B. Eng. 549; Broekway v. Allen, 17 Wend. 40; Gerber v. Stewart, 1 Montana 172.

18 Metcalf v. Williams 104 U. S. 90; Hicks v. Hinde 9 Barb. 528; Deering v. Thom. 29 Minn. 120; McCall v. Clayton, Busbee N. C. 422; Hewitt v. Wheeler 22 Conn. 557; Hager v. Rice 4 Colo. 90; Contra Orchard v. Binninger, 51 N. Y. 652; Wing v. Glick 56 Ia. 473;

19 Roberts v. Austin, 5 Whart. 313; Newhall v. Dunlap, 14 Me. 180; Krumbhoar v. Ludeling, 3. Martin 640; Wolf v. Jewett, 10 La. 383, Bany v. Pike 21 La. Ann. *contra* Nash v. Towne 72 U. S. 703.

20 Shaver v. O. M. Co. 21 Cal. 45; Hall v. Crandall, 29 Call 567; Shotwell v. M'Kown 5 N. J. L. 828; Armstrong v. Kirkpatrick, 79 Ind. 527; Shaver v. O. M. Co. 22 Cal. 45.

21 National Bank v. Dix 123 Mass. 148.

22 Greene v. Kopke, 8 C. B. 549.

23 Fairlie v. Fenton, 5 L. R. Exch. 169.

24 Cook v. Gray. 33 Mass. 106.

25 Rogers v. March 33 Me. 106.

26 Ladd v. Houghton, 46 L. J. Exch. Div. (Eng.) 71.

27 Ogden v. Hall, 4 L. J. N. S. Eng. 751.

28 Herod v. Rodman, 16 Ind. 241.

him; and upon that ground it has been held, where a contract described the contracting party as "A, agent of the Atrato" (a steamship) and was signed "A, agent," but provided for the transportation of property on board said vessel, and contained stipulations on the part of the ship, and as to the liability of the owners, that A was not personally bound.[29]

When the contract appears upon its face to be for the benefit of the principal that fact is also entitled to considerable weight. In the case of Whitney v. Wyman,[30] where the presidential committee of the A Co. wrote to D, a manufacturer of machinery, and ordered certain machinery which they stated was for the use of the company, and appended to their signatures the words "Presidential Committee, A Co.," and D directed his acceptance of the order to the "A Co.," it was held that the members of the committee were not bound as contracting parties. The best way for an agent to sign an instrument upon which he desires to bind his principal and not himself is, A (the principal) by his agent, or attorney, B. A by B is also correct. B, (the agent) for A (the principal) would seem equally proper, but in several cases involving negotiable paper signed in that form, the agent has been held liable.[31] "For the A Co., B, Prest.," has been held binding upon B.[32].

Where an instrument is executed by one who describes himself as the agent of a corporation and the corporate seal is attached, the description of the agent and the seal taken together are as a general rule, conclusive evidence of an intention to bind the corporation. It is never to be presumed that a corporate agent has affixed the seal of the corporation to an instrument intended to bind him personally, unless the seal is the only evidence of an intention to act in a representative capacity.[33]

BENJ. F. REX.

St. Louis, Mo.

[29] Goodenough v. Thayer, 132 Mass. 152.

[30] 101 U. S. 392.

[31] Moore v. Cooper, 1 Spear 87; Taylor v. McLean, 1 McMullan (S. C. L.) 352; Fash v. Ross 2 Hill S. C. 294; Patterson v, Henry, 4 J. J. Marsh, 126; Offutt v. Ayres 7 Mon. (Ky.) 356; See also Early v. Wilkinson 9 Grat. 68, where the signature was "A for B," and "C for B," was considered surplusage because of the brackets, *contra* Cook v. Sanford 3 Dana Ky. 237.

[32] Macbean v. Morrison, 1 A. K. Marsh Ky. 545, *contra*; Long v. Colburn, 11 Mass. 76; Roney v. Winter, 37 Ala. 277; Draper v. Heating Co. 5 Allen 338; Tiller v. Spradley, 39 Ga. 35.

[33] Scanlan v. Keith 102 Ill. 634; Mans v. Swormstedt 32 Ind. 87; Pitman v. Kintner, 5 Blackf. Ind. 250; Aggs v. Nicholson, 1 H. & M. Eng. 165, *contra*; Dutten v. Marsh, L. R. 6 Q. B. (Eng.) 361.

SUITS BY AND AGAINST COUNTIES.

The law of counties as distinguished from that of strictly municipal corporations, presents many interesting points of more than local importance, especially in regard to the remedies invoked against such bodies or in their favor. It should in the first place be noted that counties are *quasi* corporations, and can sue and be sued.[1] Without such authority on the part of a political subdivision of the State to protect the public property and to resort to the courts to correct an abuse or redress a wrong or maintain a right, the power to acquire and hold property, however useful or necessary, would be utterly unsubstantial.[2] And an organized county in one State, having the right to sue and be sued, etc., in that State, may commence and maintain a suit in a Federal court of another State, to recover property of which it has been wrongfully deprived, or the value thereof.[3] Were it otherwise a county would be at the mercy, as was said in a peculiar case, of every scoundrel who would spoliate its treasury or embezzle its property, and get across the lines of a State before being apprehended.[4]

But while a county is a *quasi*-corporation which can sue and be sued, the people of a

[1] Joy v. Oxford, 3 Me. 131; Price v. Sacramento, 6 Cal. 254; Commis. v. Day, 19 Ind. 450; Hampshire v. Franklin, 16 Mass. 87; Hawkes v. Kennebeck, 7 Id. 461; Lincoln v. Prince, 2 Id. 544; Jewett v. Somerset, 1 Me. 125; Emerson v. Washington, 9 Id. 88. A county may sue in foreclosure, Lincoln County v. Mc Clellan, 3 Mo. App. 311; or in ejectment, Lincoln County v. Magruder, Id. 314; or upon a note payable to the county for the use of the school fund, Barry County v. McGlothlin, 19 Mo. 307.

[2] Marion County v. McIntyre, 10 Fed. Rep. 543; U. S. Cir. Ct. Dist. Neb. May, 1880. Since reported, 2 McCrary, 143.

[3] *Ibid*; as noted 7 South, L. Rev. 591.

[4] *Ibid*; the opinion was given by Dundy, D. J.

county are not a corporation, nor are they recognized in law as capable of suing or being sued,[5] though they may waive strict compliance with a law passed for their benefit.[6] At common law, however, a county can not be sued;[7] but suits may now be brought against a county as such, upon any complete cause of action or claim against it, for which no other specific remedy is provided by law.[8] The tribunal for litigation concerning counties need not be local. Like municipal corporations generally, counties are liable to suits in the Federal courts, as citizens of the States in which they are located.[9] And conversely a county may sue in replevin in a Federal court of another State.[10]

The mode of prosecuting actions against counties is not uniform. If the fiscal affairs of a county are committed to a board of commissioners, suits against the county may be brought against such board,[11] and service on a majority of the commissioners is sufficient.[12] There are usually preliminary requisites to actions against counties. Before a person having a claim against a county can bring suit thereon, he must present it to the board of supervisors of the county for allowance; and in a suit against the county, the fact that the claim was presented to the board and disallowed by it, must, in general, be averred in the declaration.[13] Indeed it is made a general rule, by statute, that a claim or demand proper to be audited by the county board cannot be made the subject of an action, until due presentment to the board, and a refusal to allow it;[14] and this rule is founded on the propriety, in the case of counties, of giving notice of the claim and an opportunity to pay without suit.[15] It has been held to apply even in the case of a money judgment against a county;[16] but not to a claim against a county for damages for property destroyed by a mob;[17] nor to a claim in favor of a county solicitor, payable out of the fines and forfeitures in the county treasury.[18] And in some of the States, a county may be sued upon a demand which on presentation to the commissioners, they have refused and disallowed, without alleging the presentment in the complaint.[19]

The parties to suits in which counties are involved, and the pleadings in such actions vary with special regulations. A county is a public corporation, created for political purposes, and invested with subordinate legislative powers;[20] and where it can act and be acted on only through the medium of the justices comprising the county court, a bill in chancery brought in their name is proper.[21] So the county commissioners are the proper parties plaintiff to sue upon a county treasurer's bond, which, pursuant to statute, runs to them as obligees, although the money for which the action is brought constitutes school funds.[22] In an action to recover from a county the agreed price for the printing and publication in a

[5] Smith v. Myers, 15 Cal. 34.

[6] Calaveras County v. Brockway, 30 Cal. 326, 343.

[7] Lyell v. St. Clair County, 3 McLean 580; Hunsacker v. Borden, 5 Cal. 288; Ward v. County of Hartford, 12 Conn. 404; Schuyler Co. v. Mercer, 9 Ill. 20; Anderson v. State, 23 Miss. 459.

[8] Boone Corp. § 321, and authorities cited; Adams v. Tyler, 121 Mass. 380; Loundes County v. Hunter, 49 Ala. 507; Commis. etc. v. Hurd, 49 Ga. 462; Taylor v. Mayor etc., 50 Id. 213. Other cases referred to are Rock Island v. Steele, 31 Ill. 543; People v. Commis., etc. 50 Id. 213; Klein v. Supervisors, etc. 51 Miss. 878; Murphy v. Commis., etc. 14 Minn. 67. But a county cannot be sued for failure or neglect to perform an act like the issuance of bonds, when there is a personal liability resting upon supervisors for any direliction of duty; Santa Cruz R. Co. v. Santa Clara County, 62 Cal. 180.

[9] McCoy v. Washington County, 3 Wall. Jr. 381; Boone Corp. § 321; referring also to Cowles v. Mercer County, 7 Wall. 118; to same effect is Commis. of Floyd v. Hurd, 49 Ga. 462. But it is laid down in Lehigh County v. Kleckner, 5 Watts & S. 181, that a county can be sued only in the courts of the county itself.

[10] Marion County v. McIntyre, 10 Fed. Rep. 543; s. c. 2 McCrary, 143.

[11] Collins v. Hudson, 54 Ga. 25; and compare Commis. etc. v. Paine, Wright (Ohio) 417; Gross v. Sioux County, 2 Dill. 509.

[12] *Ibid*; Boone Corp. § 321.

[13] Lawrence County v. City of Brookhaven, 51 Miss. 68.

[14] Commis. etc. v. Wood, 35 Ind. 70; Armstrong v. Tama County, 34 Iowa, 309; Jones v. Commis. etc. 73 No. Car. 182; Barbour County v. Horn, 41 Ala. 114; Taylor v. Marion County, 51 Miss. 731; Hohman v. Corral County, 34 Tex. 36.

[15] McLendon v. Commis. etc. 71 N. C. 38; Boone Corp. § 321, notes 2 and 3.

[16] Alden v. Alameda County, 43 Cal. 270

[17] Clear Lake etc. Co. v. Lake County, 45 Cal. 90.

[18] Palmer v. Fitts, 51 Ala. 489; see Boone Corp. s. 321, notes 4, 5, and 6, for basis of paragraphs.

[19] Gillett v. Lynn County, 18 Kan. 410.

[20] Maury County v. Lewis County, 1 Swan. 236; and see further, Boone Corp. § 314, notes 1, 2 and 3, and cases therein cited.

[21] Maury Co., v. Lewis Co., just cited.

[22] Blake v. Johnson County, 18 Kan. 266; compare Lafayette County v. Nixon, 69 Mo. 581.

newspaper of the "fiscal statement" and "delinquent tax list" of the county for a certain year, it is not necessary to directly allege that the newspaper in which the publication was made was of the size, quality, etc., required by the statute, nor that plaintiff was the lowest bidder;[23] nor specifically that the bond given was approved by the county commissioners;[24] nor that an affidavit of the publication had been made and filed as required by the law.[25] Again, a person furnishing clothing to a sheriff, for a prisoner in the jail may maintain an action against the county therefor, and suit need not be brought by the sheriff, although the statute prescribes that the latter shall "furnish" the clothing, for such a term should be construed to mean "obtain" or "procure;"[26] and this is particularly the case where the question whether the clothing was necessary was vested in the discretion of the sheriff,[27] and presented the sole inquiry to be made by the plaintiff.[28] Extraordinary remedies may be employed against counties as well as against strictly municipal corporations.[29] Mandamus for instance, is sometimes a proper remedy against a county.[30] But mandamus will not be issued against a county if the grounds are doubtful, as where the board of supervisors refused to allow demands arising from the unauthorized action of the sheriff in employing and boarding watchmen for a jail and renting an office for himself at the expense of the county,[31] especially where final control of such matters had been bestowed on the board.[32]

In *certiorari* to county commissioners, costs may be allowed against the respondents at the discretion of the court, but not if they do not oppose the proceedings.[33] The decided weight of authority, at least by analogy, holds according to a recent opinion, that neither counties nor their officers as such, are subject to process of garnishment. This statement was made in a case where a county clerk, to whom a county warrant had been assigned, was served with notice of garnishment by a judgment creditor of the person in whose favor the warrant had been drawn.[34] It was shown that the doctrine declared to prevail had been applied to counties in several instances;[35] and that the same rule had been sustained in regard to municipal and other public corporations and their officers,[36] although there were unauthoritative cases which took a contrary view.[37] In a late instance, however, an exception to the rule on the ground of estoppel was made when process of garnishment on a judgment was served on a bank in which the judgment debtor, as county treasurer, had deposited a certain sum. The bank answered that the money had been deposited as public funds. It was held that in the face of the law prohibiting the loaning of public funds, such defence could not be heard either from the judgment debtor or from the bank, and that the latter was liable on the process of garnishment.[38]

[23] Folsom v. Chicago County Commis. 28 Minn. 324. The cases cited in support are Webber v. Gottschalk, 15 La. Ann. 376; Wiley v. Board of Education, 11 Minn. 377.

[24] Folsom v. Chicago County Commis., just cited, decided Oct. 4, 1881.

[25] *Ibid*; originally reported, 9 N. W. Rep. 881.

[26] Feldenheimer v. Woodbury County, 56 Iowa 379.

[27] Feldheimer v. Woodbury County, just cited; original report in 9 N. W. Rep. 315.

[28] Ibid, per Seevers J., June 16, 1881.

[29] Cassidy v. Palo Alto County, 12 N. W. Rep. 231; Sup. Ct. Iowa, Apr. 20, 1882.

[30] See Commis. etc. v. Moore, 53 Ala. 25; Connor v. Morris, 23 Id. 447; Boone Corp. sec. 321.

[31] Cooley, J., in Peck v. Kent County Supervisors, 47 Mich. 477.

[32] Ibid. The decision was rendered Jan. 18, 1882, and originally appeared in 11 N. W. Rep. 279. It cites Mixer v. Supervisors of Manister, 26 Mich. 426; Clark v. Supervisors of Ingham, 38 Id. 658; MacDonald v. upervisors of Muskegon, 42 Id. 515. Mandamus will likewise not lie against a county board which rejects a claim for a failure to give all the items, as prescribed by law; Christie v. Sonoma County Supervisors, 60 Cal. 164.

[33] Stetson v. Penobscot County Commis. 72 Me. 17; Costs in such cases do not go against the county; *Ibid.*

[34] State v. Eberly, 12 Neb. 616; Jan. Term. 1882.

[35] Ward v. County of Hartford, 12 Conn. 404; Wallace v. Lawyer, 54 Ind. 501; McDougal v. Hennepin County, 4 Minn. 184.

[36] The cases outlined in support of this view were People v. Mayor of Omaha, 2 Neb. 166; Burnham v. Fond Du Lac, 15 Wis. 193; Jenks v. Osceola Township, 45 Iowa 554; Wallace v. Lawyer, 54 Ind. 501; School District v. Gage, 39 Mich. 484; Merwin v. City of Chicago, 45 Ill. 133; Millison v. Fisk, 43 Id. 112; Chicago v. Hasley, 25 Id. 595; Stillman v. Isham, 11 Conn. 123. To the same effect are mentioned Hill v. La-Crosse etc. R. Co. 14 Wis. 291; Hawthorne v. City of St. Louis. 11 Mo. 59; Fortune v. St. Louis, 23 Ind. 239; Mayor etc. of Mobile v. Rowland & Co., 26 Ala. 498; Mayor etc. of Baltimore v. Root. 8 Md. 95; Erie v. Knapp. 29 Pa. St. 173; Bivins v. Harper, 59 Ill. 21; Ripley v. Gage County, 3 Neb. 397.

[37] Wales v. Muscatine, 4 Iowa, 302, before remedial statute; City of Newark v. Funk, 15 Ohio St. 462, disapproved in the present case.

[38] Bank v. Gandy, 9 N. W. Rep. 566, Sup. Ct. Neb

In general, the same rule governs final as controls auxiliary process. Thus, it is the current doctrine that neither the private property of individuals within the limits of a county,[39] nor that used for public purposes by municipal corporations generally,[40] can be taken on an execution against such bodies.[41] The creditor having, however, established his claim by judgment, it then becomes the duty of the proper officers to provide the means of payment out of the public revenues, which duty is enforceable by mandamus.[42]

A county is liable to a suit for equitable relief in proper cases, as at the instance of a party who sold and conveyed lands to a county, which it received and occupied, and took back as security for a balance of the purchase price, a mortgage which it turned out that the county commissioners had no authority to make as a binding obligation of the county.[43] But where a county commissioner sells different pieces of land by the county to different parties, who, subsequently on the failure of the county authorities to comply with the contract, all sell their interests to one party, and he tenders the amount necessary for the enforcement of the contracts, the Federal Court has no jurisdiction of such contracts unless his assignees might also have sued upon it.[44]

The grounds upon which suits by or against counties are maintainable, involve for their discussion a consideration of the functions, authority and liabilities of these bodies such as would unduly extend the scope of the present article. No more can be done, therefore, than to touch upon such salient and suggestive points as are of special or recent interest. Thus it has been lately decided that a county may sustain an action in its own name against one who destroys the usefulness of a public highway, by virtue of its general powers to institute suits;[45] and so a county may sue to recover possession of land,[46] or to enforce a lien,[47] or upon a note[48] or a bond.[49] On the other hand, even though a county has no power to employ a broker to sell its lands, yet if it adopts a sale negotiable by him, and receives the avails thereof, it is liable to him for his commissions.[50] A county is not at common law, however, liable for injuries to persons travelling over a public bridge within its boundaries, caused by a defect in such bridge due to the negligence of the county officials.[51] There could be recovery in such a case against a natural person or a municipal corporation proper, but a county is not, in the correct sense of the word, a municipal corporation, but a mere local subdivision of the State, created by it without the request or consent of the people residing therein;[52] and as such *quasi* corporation no private action can be maintained against it for a breach of public duty, unless such action be given by statute.[53]

San Francisco, Cal. A. J. DONNER.

July 7, 1881. Following State v. Kein, where it was declared as to State funds, upon authorities cited, that, the depositing of money generally in a bank was, in legal effect, the lending of the money to the bank.

39 Emeric v. Gilman, 10 Cal. 404.

40 Lyon v. City of Elizabeth, 42 N. J. L.

41 Rees v. City of Watertown, 19 Wall. 107 (disapproving contrary practice in New England States, which is upheld in Chase v. Merrimack Bank, 19 Pick. 564; Beardley v. Smith, 16 Conn. 368); Merriwether v. Garrett, 102 U. S. 472; Monaghan v. City of Philadelphia, 28 Pa. St. 207; Schaffer v. Cadwallader 36 Id. 126; Comm. v. Perkins, 43 Id. 400; City of Chicago v. Hasley 25 Ill. 565; Dill. on Mun. Corp. secs. 446, 686; Funk v. Freeholders of Hudson, 10 Vroom. 347. See also Freeman on Ex. sec. 22; Lloyd v. Mayor of New York 5 N. Y. 369; Clarke v. [Rochester, 24 Barb. 446; People v. McGuire, 32 Cal. 140.

42 Lyon v. City of Elizabeth, before cited.

43 Chapman v. Douglas County Commis. 2 Sup. Ct. Rep. 62; U. S. Sup. Ct. March 19, 1883, cited and followed in Wrought Iron Bridge Co. v. Town of Utica, 17 Cent. L. J. 210, 213.

44 Corbin v. Black Hawk County, U. S. Sup. Ct. Apr. 24, 1882, 4 Morr. Trans. 632; noted 15 Cent. L. J. 215.

45 Lawrence County v. Chattaroi R. Co. 1 Ky. L. Rep. & J. 36; Ky. Ct. App. June 5, 1883.

46 Lincoln County v. Magruder, 2 Mo. 314.

47 Lincoln County v. McClellan, 3 Mo. App. 311.

48 Barry County v. McGlothlin, 19 Mo. 307.

49 Lafayette County v. Nixon, 69 Mo. 581.

50 Call v. Hamilton County, 17 N. W. Rep. 677; Sup. Ct. Iowa, Dec. 12, 1883. Noted 18 Cent. L. J. 99.

51 Woods v. Colfax County, 23 Alb. L. J. 14; Neb. Sup. Ct. Nov. 10, 1880: following the rule laid down in Wehn v. Commis. of Gage, 5 Neb. 494.

52 See Commis. v. Mighels, 7 Ohio St.; Riddle v. Proprietors, 7 Mass. 169.

53 Riddle v. Proprietors, and Woods v. Colfax County, just cited. To the same effect see also Mower v. Inhab. of Lancaster, 9 Mass. 247; Angell & Ames on Corp. sec. 629 and note; White v. City Council 2 Hill 571; Ward v. County of Hartford, 12 Conn. 404; Freeholders of Sussex v. Strader, 3 Harrison 158; Hedges v. County, 1 Gilm. 567.

CONSTRUCTIVE MURDER.

The law as to what is usually known as constructive murder is not by any means free

either from difficulty or ambiguity. According to Foster,[1] if an action unlawful in itself, be done deliberately and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder. Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—(*a*) An intent preceding the act to kill or to do serious bodily injury to the person killed, or to any other person. (*b*) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not. (*c*) An intent to commit any felony. (*d*) An intent to resist an officer of justice in the execution of his duty.[2] The true rule would seem to be that laid down in Russell on Crimes,[3] viz., that wherever an unlawful act, an act *malum in se*, is done in prosecution of a felonious intention, and death ensues, it will be murder. In a note appended to this subject, Mr. Greaves added: "There is, therefore, much in the books on the subject; and with all deference to the opinion of others, the rule that anyone who deliberately attempts to commit a felony and thereby occasions death, is guilty of murder, seems to be right. If this were not the rule, any person might burn any man's house and him in it, and be liable to no punishment for causing the death, for it never could be proved that he knew there was anyone in it. And a more salutary rule cannot be, than that he who attempts to commit a felony shall be liable for the natural consequences of his felonious act." A very good illustration is afforded by a case tried in 1862, on the Western circuit, viz., Reg. v. Gilbert, known as the Fordingbridge murder. An innocent girl, on her way to church, had to pass over a stile into a narrow wooded lane, and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl to stifle her cries, and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her; indeed, his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was and now is, the death having been occasioned by violence used to facilitate the commission of a rape, the offense was murder. In Reg. v. Horsey[4] the prisoner, who was indicted for murder, set fire to a stack of straw in an inclosure in which was an outhouse. While the fire was burning, the deceased was seen in the flames, and his body was afterwards found in the inclosure. It did not clearly appear whether he had been in the outhouse or merely lying on or by the side of the stack. There was no evidence who he was, or how or when he came there, or that the prisoner had any idea that anyone was or was not likely to be there, and when he saw the deceased he wanted to save him. It did not exactly appear how long the fire had been kindled before it was discovered, but very soon after it was discovered the deceased was seen in the flames. Baron Bramwell in charging the jury, said:—"The law laid down is that where a person in the course of committing a felony causes the death of a human being, he commits murder, even though he did not intend it. Now, that may appear to you unreasonable, yet, as it is laid down as law, it is our duty to act upon it. The law, however, is, that a man is not answerable, except for the natural and probable result of his own act; and, therefore, if you should not be satisfied that the deceased was in the farm or inclosure at the time the prisoner set fire to the stack, but came in afterwards, then, as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act, and if you take that view you ought to acquit the prisoner on the present charge." We regard the above as an erroneous statement of the law. No doubt it was not in any way considered, and was probably delivered with the view of securing, if possible, the acquittal of the accused on the capital charge; for, as Mr. Greaves observes, "the natural and probable result of setting fire to anything is that it will burn whatever may happen to be in proximity to it during its progress, and

1 p. 261.
2 See Criminal Code Bill Commission Report, p. 23.
3 Vol. 1, p. 740.
4 3 F. & F. 287.

not merely what happens to be so when the fire was lighted. If a man sets an infernal machine with a lighted fuse the natural and probable consequence is that it will kill whoever is near it at the time it explodes, and it has never been doubted that it would be murder if a person was killed by it, however far off he was when the fuse was lighted.[5] Again, although in one sense it may be called accidental death where a person dies of a blow not intended against him, the law regards it quite otherwise. Thus, if X, either by poison or any other means, compass the death of Y, and unintentionally causes thereby the death of Z, there can be no doubt that X is guilty of murder. Or, again, if one man stabs at another in the street either intending to kill him or do him some grievous bodily harm, and, missing the person he intends to strike, hits a bystander instead, thereby causing his death, doubtless he is guilty of murder. Or, where a woman is assaulted in a railway carriage, and opens the door (the train being in motion) and jumps out or falls, then no doubt, if she dies from the fall, the man would be guilty of murder if the assault was committed in furtherance of an attempt to commit a rape. Suppose, however, the woman was a person of doubtful reputation or a common prostitute, and she is solicited in a railway carriage by a man, but refuses for some reason to accede to his desire, and a quarrel ensues, and he strikes her a blow, and she, becoming terrified, opens the door of the carriage, and falling out, meets with her death, we think this would not be murder; for the blow was merely an unlawful act on the latter view of the facts, and where the act is merely unlawful and not felonious, then if death ensues indirectly the killing is manslaughter and not murder.—*Law Times.*

[5] Russell on Crimes, vol. 1, p. 742, note.

TORT—FALSE CHARGES OF SLANDER—LIABILITY.

KNIGHT v. BLACKFORD.

Supreme Court District of Columbia, Mar. 17, 1884.

1. Words which do not disparage the character of the plaintiff are not actionable, although special damage flow from the uttering of them.

2. Where A tells B that C, a government clerk, had spoken disrespectfully of his chief, D, and this coming to the ears of D, he discharges C from office, it seems that the damages are too remote to enable C to maintain an action of slander against A.

L. G. Hine, for plaintiff; *Cook & Cole* for defendant.

The plaintiff claimed that the defendant had falsely represented to others that the plaintiff charged John Sherman with bribing delegates to vote for him at the National Convention, and with paying out money to organize "Sherman clubs" in the Carolinas; that he charged the Deputy Second Auditor of the Treasury Department with levying political assessments, and the Second Auditor with having compelled an officeholder to buy him a horse to retain his office, by reason of which false representation he was discharged from his office.

Cox, J., (after stating the facts:)

We understand that there are two classes of words that are slanderous; one class consisting of words which are actionable *per se*, and the other, those which are actionable if it be shown that their publication has occasioned special damage to the plaintiff. Words which impute a crime that is punishable criminally, or which assert that a party is unfit for his office or calling in life, or which impute to him some contagious disease that may cause him to be avoided, are all words actionable in themselves. But to say of a man, generally, that he is a rascal, or a scamp, or a dishonest man, is not actionable unless it be proved that some special damage resulted from the use of the language, as, for example, that it caused him the loss of employment. If special damage results, then it is necessary for the plaintiff to aver and prove that fact. Actions of that sort are called *per quod* actions.

In this case, it is not claimed that the language was actionable *per se*, but that it was actionable by reason of the special damage alleged to have resulted from its use. In these *per quod* actions it is not only necessary to show that the language did produce actual damage, but it must appear to be defamatory and scandalous. This rule, which is laid down in the text-books, is also well stated in the case of Terwilliger v. Wands, 17 N. Y. 60, where the court say:

"There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law, words which do not degrade the character do not injure it and cannot occasion loss. In Cook's Law of Defamation (page 24) it is said: 'In order to render the consequence of words spoken special damage, the words must be in themselves disparaging; for if they be innocent the consequence does no

follow naturally from the cause.' In Kelly v. Partington, 5 Barn. & Adolph., 645, which was an action for slander, the words in the declaration were: 'She secreted 1*s*. 6*d*. under the till, stating that these are not times to be robbed.' It was alleged as special damage that by reason of the speaking of the words a third person refused to take the plaintiff into service. The plaintiff recovered one shilling damages, and the defendant obtained a rule *nisi* for arresting the judgment on the ground that the words, taken in their grammatical sense, were not disparaging to the plaintiff, and, therefore, that no special damage could result from them. Denman, C. J., said: 'The words do not, of necessity, import anything injurious to the plaintiff's character, and we think the judgment must be arrested unless there be something on the face of the declaration from which the court can clearly see that the slanderous matter alleged is injurious to the plaintiff. Where the words are ambiguous, the meaning can be supplied by inuendo; but that is not the case here. The rule for arresting the judgment must therefore be made absolute.' Littledale, J., said: 'I cannot agree that words laudatory of a party's conduct would be the subject of an action if they were followed by special damage. They must be defamatory or injurious in their nature. In Comyn's Digest, title 'Action on the Case for Defamation,' D. 730, it is said generally that, 'any words are actionable by which the party has especial damage; but all the examples given in illustration of the rule, are of words defamatory in themselves but not actionable because they do not subject the party to a temporal punishment. In all the instances put, the words are injurious to the reputation of the person of whom they were spoken.' Taunton, J., said: 'The expression ascribed to the defendant, These are no times to be robbed, seems to be saying the times are so bad I must hide my money. If Stenning refused to take the plaintiff into his service on this account, he acted without reasonable cause; and in order to make the words actionable, they must be such that special damage may be the fair and natural result of them.' Patterson, J., said: 'I have always understood that the special damage must be the natural result of the thing done, &c. It is said that the words are actionable because a person, after hearing them, chose, in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered a natural result of the speaking of the words. To make the speaking of the words wrongful, they must, in their nature, be defamatory. Vicars v. Wilcocks, 8 East., 1.' It necessarily follows from the rule that, the words must be disparaging to the character; that the special damage, to give an action, must flow from disparaging it. In the case last cited, the plaintiff actually suffered damage from the defendant's words by their bringing her into disrepute. But the words were not calculated to produce such result, and, therefore, the action would not lie."

This proposition might be further illustrated by supposing that I should go to the Secretary of the Treasury, and say to him that a certain clerk in his department was in affluent circumstances and did not need office, and that I, on the other hand, did need it; that the Secretary should turn him out, on the strength of that statement, and put me in. That would be a damaging statement on my part, and yet no action for slander could be based upon it. So that the question which meets us on the threshold of the case is, whether the words alleged in this declaration were defamatory and scandalous.

It will be observed that the defendant is not charged with saying anything about the plaintiff's character, but with saying that the plaintiff disparaged somebody's else character; that is to say, that of the Secretary of the Treasury, and that of some of his subordinates. It is not even complained that the defendant accused the plaintiff of falsehood in making these charges against the Secretary and others. If they were true, the plaintiff would have had a right to make them. The declaration does not complain that the defendant even imputed false statements to the plaintiff, much less any more serious moral delinquency. The words, therefore, do not disparage the character of the plaintiff at all, and we cannot conceive how an action can be grounded upon allegations that impute nothing wrong.

Independently of that, there is another difficulty about the case. The allegations, on the strength of which it is said that the plaintiff was removed from office, were not made to the Secretary of the Treasury, but to third persons whose names are given in the declaration, viz., Montis, Doty, Cobaugh and others. Certainly, the representations to them did not lead to the plaintiff's dismissal from office, because they had no power to remove him. There is a gap in the proof somewhere. Some other agency must be brought in to connect the alleged slander with the removal from office. The rule of law is, that the plaintiff can only recover for the direct and immediate consequences of the acts complained of. The dismissal from office could not have been the direct and immediate consequence of the representations made by the defendant to third persons who had no power of removal. Somebody else must have interposed and repeated this alleged slander to the Secretary of the Treasury, which repetition was the immediate and proximate cause of the wrong complained of. The authorities are to the effect that the repetition of slander, if that leads to the result, and not the original utterance of it, is the immediate and proximate cause of the injury. The case I already referred to, Terwilliger v. Wands, decides that point, and refers to a number of cases in support of it. That would apply to the representations, on the strength of which it is said the plaintiff

was removed from office. The other representations, that are said to have delayed his reinstatement in office, which were made directly to the appointment clerk and to the Sixth Auditor, do not come within this rule, but all the representations complained of fall short of being actionable, because they are not defamatory and slanderous in their character.

With these views we are constrained to hold that the demurrer was properly sustained, and judgment must be affirmed.

TORT — DOG-BITE — STEP-FATHER — SUIT FOR DAMAGES— LIMITATIONS— PENAL STATUTES—PLEADING—MISJOINDER.

WHITAKER v. WARREN.

Supreme Court of New Hampshire.

1. A count in debt, for injuries caused by a dog, and one in case, for the same injuries, may be joined.

2. A person standing *in loco parentis* to an infant, may recover for medicines and medical attendance furnished to the infant in consequence of injuries resulting in death, and for loss of service up to the time of the death, when it appears that there has, in fact, been a loss of service.

3. A statute, limiting the time for the recovery of penalties, does not apply to cases of unliquidated damages, even though the statute giving the rights of recovery is a penal statute.

Debt upon the statute, for double damages for injuries to the plaintiff's adopted minor child from the bite of the defendant's dog. A second count declares upon the same injuries to the plaintiff's servant. Subject to exception, the plaintiff amended his declaration by adding a count in case for the same injuries to the plaintiff's adopted minor child.

The child died from the effects of the biting about ten weeks after he was bitten. It was given to the plaintiff by its parents when it was but a few months old, and had lived in the plaintiff's family and been treated as his own child ever after. The plaintiff procured the child's name to be changed, but he had not by legal proceedings adopted it.

The plaintiff claimed to recover the expenses incident to the sickness and death of the child, and for loss of its services and society to the time of its death.

The defendant claimed that the action could not be maintained; that the facts stated are not sufficient evidence of the relation of parent and child, or master and servant; that, if they were, the right of action was barred, for the reason that the statute on which it was founded was a penal statute.

Sulloway, Topliff & O'Connor, with whom were *Foote* and *Dearborn*, for the plaintiff; *Stevens*, for defendant.

STANLEY, J., delivered the opinion of the court.

The court were authorized to allow the amendment, to prevent injustice. Whether or not it was necessary for this purpose depended upon facts, the existence of which must be established at the trial term, where the question of amendment is to be determined.

The defendant claims that the plaintiff cannot recover, because neither the relation of parent and child, nor that of master and servant, existed between the plaintiff and the deceased; but the facts stated are evidence tending to show that the plaintiff stood *in loco parentis* to the child, and while this relation existed, the plaintiff was entitled to all the rights of a parent. Freto v. Brown, 4 Mass. 675; Mulhern v. McDavitt, 16 Gray 404; Williams v. Hutchinson, 3 N. Y. 312; Cooley Torts 235. This being the case, the plaintiff is entitled to recover for nursing and care of the child after the injury and while it lived, and for medicines and medical attendance. For the personal injury to the child he cannot recover, Hall v. Hollander, 4 B. & C. 660; Dennis v. Clark, 2 Cush. 347, 351; Bouv. Inst. § 2298, nor for loss of service, without evidence to that effect. Woodward v. Washburn, 3 Denio 369, 371; Stephenson v. Hall, 14 Barb. 222; Hall v. Hollander, *supra*; Dennis v. Clark, *supra*; Franklin v. South Eastern Railway, 3 H. & N. 211; Cooley Torts 226; Wood Mas. & S. 441, 442, 443.

The right of the parent to recover for loss of services caused by injuries inflicted by third persons, is founded upon the fact that he is entitled to the earnings of the child during its infancy, Jenness v. Emerson, 15 N. H. 486; Schou. Dom. Rel. 344, 631; and it stands on the same ground as the right of a master to the labor and services of his apprentices. Schou. Dom. Rel. *supra*; 2 Kent. Com. 192 *et seq.* The plaintiff standing to the child *in loco parentis*, we cannot say that he is not entitled to recover for the loss of his services. His right to recover is not absolute;—it depends upon whether there has in truth been a loss of services; whether the child was capable of rendering services; and whether the plaintiff has been deprived of the services by the defendant's wrongful act. If the jury should so find, the plaintiff is entitled to damages from the time of the injury until the child's death,—such damages as will be a full compensation for the loss sustained during that period. Ruth. Inst., B. 1, c. 22, s. 1; Greenl. Evid., s. 253; Field Dam. 21; Wyatt v. Williams, 43 N. H. 107. Whether he can recover for loss of service after the death and during its infancy, is a question on which we express no opinion.

The point that the action is penal, and is therefore barred by the statute, G. L., c. 266, s. 10, cannot be sustained. The statute cited does not apply to cases of unliquidated damages, like the present case, even though the statute on which it is founded may be in some respects penal. It ap-

plies to cases where the amount of the penalty is fixed in the statute.

Case discharged.

Allen, J., did not sit; the others concurred.

NOTE—I. Bouvier says "It is the act by which a person takes the child of another into his family and treats him as his own." Bouv. Dict., "Adoption;" Abbott Dict. 36, subject, "Adopt;" Cooley Torts 235, subject, "Adopted Children;" Schou. Dom. Rel. 315; Burrill Dict., "Adoption;" Inst. I, 11 1. The relation of parent and child is established *prima facie* by evidence that the parties lived together, and recognized by their acts the existence of that relation. Dalton v. Bethlehem, 20 N. H. 506; Schou. Dom. Rel. 321. It is true, as a general rule, that when a step-father receives the children of his wife into his family, and adopts them as his children, he cannot charge them for their support, nor can they claim from him pay for services, he having placed himself *in loco parentis*. In such case the relation of parent and child attaches, and continues until the connection is dissolved. He who receives and treats a child in such a manner as to raise the presumption that he intends to create the relation of parent and child, and that relation being assumed, all parties are bound by it so long as it continues. Mowbry v. Mowbry, 64 Ill. 387.

By admitting the child into his family, and treating him as a member thereof, he voluntarily assumes the the relation to him of parent. When this is done, the reciprocal rights, obligations, and duties of parent and child attach, and continue so long as this assumed relation continues. Brush v. Blanchard, 18 Ill. 47; 2 Kent Com. 192; Stone v. Carr, 3 Esp. 1.

In Moritz v. Garnhart, 7 Watts (Penn.) 303, 304, Gibson, C. J., in discussing this question says: "Who has not seen an adopted child become an object of as tender solicitude as if it had issued from its foster-father's loins?—and can it be said that having bestowed his affections on it and reared it by his bounty, he yet shall not be permitted to exercise the right of a father to it against an intermeddler? It would be a reproach to the law if he should not."

Cooley says "Step-children and adopted children who are received into a family stand for the time being in the position of children," Torts, 42 citing Mulhern v. McDavitt, 16 Gray 404; Freto v. Brown, 4 Mass. 675; Meyer v. Temme, 72 Ill. 574; Mowbry v. Mowbry, 64 Ill. 383; Bond v. Lockwood. 33 Ill. 212; Brush v. Blanchard, 18 Ill. 46; Williams v. Hutchinson, 3 N. Y. 312; Sharp v. Cropsey, 11 Barb. 226; Defrance v. Austin, 9 Penn. St, 309; Lantz v. Frey, 19 Penn. St. 366; Andrus v. Foster, 17 Vt. 556; Lanay v. Vantyne, 40 Vt. 501; Hussey v. Roundtree, Busbee 110; Gillett v. Camp, 28 Mo. 541; Murdock v. Murdock, 7 Cal. 511; Sword v. Keith, 31 Mich. 247; Ruckman's Appeal, 61 Penn. St. 251. One who receives children into his family and treats them as members of his family, in such a manner as to raise a presumption of his intention to create the relations of parent and child, thereby assumes a liability for their support and acquires the same right to their custody and services as had their real parents." 5 Wait Act. & Def. 55, s. 3. "The doctrine on the subject, however, seems to be well settled upon the authority of subsequent cases in England, as well as the decisions of the courts of this country. There is no obligation the part of the step-father to provide for the children of his wife by a former husband, by virtue merely of his marriage with their mother. He may refuse to provide for them, and could not be compelled to do so. The liability in such cases depends upon the relation he chooses to assume in reference to them. If he holds them out to the world as members of his family, he stands in *loco parentis*, and incurs the same liability with respect to them that he is under to his own children. And the presumption in such case is, that they deal with each other as parent and child, not as master and servant. This relation being established, the reciprocal rights, duties, and obligations pertaining to it arise between them the same as if he were their natural father." St. Ferdinand Loretto Academy v. Bobb, 52 Mo. 360. In the matter of Joseph Murphy, 12 How. Pr. 513, a child in infancy was given verbally to an uncle and aunt, who took its custody, care and tuition for nine successive years. The court held that its adopted parents, as against its natural parents, had paramount legal claims to the custody and services of the child. 5 Kent 185. As to estoppel see Freto v. Brown, 4 Mass. 675; Campell v. Cooper, 34 N. H. 68; Cooley Torts, 241; Wood Mas. & S., 447, 448.

II. In an action for damages for an injury resulting in the death of a minor child, the parents may recover the pecuniary value of the child's services during his minority, together with the expenses of care and attention, medical attendance, etc., during his disability in consequence of the injury. Field. Dam. 507; Penn. R. Co. v. Zebe, 33 Penn. St. 318; Condon v. The Great S. W. R. Co. 16 Irish L. R. (N. S.) 415; Potter v. Chicago & N. W. R. C. 21 Wis. 377; 1 Southern Law Review (N. S.) 719; McCarthy v. Guild, 12 Met. 292. In Ford v. Monroe, 20 Wend. 210, it was held that the loss of services of the child during minority, and expenses occasioned by the sickness of the plaintiff caused by the shock to her maternal feelings, were proper items of damages, the same being laid as special damages in the declaration. In Traver v. Eighth Ave. R. Co. 3 Keyes (N. Y.) 497, the court held that a parent may recover for the loss of the child's services to the age of twenty-one. Caldwell v. Brown, 53 Penn. St. 453; State of Maryland v. B. & O. R. Co., 24 Md. 84; Penn. R. Co. v. Kelly, 31 Penn. St. 372; Telfer, Adm'r, v. N. R. Co., 30 N. J. 198; Walters v. Chicago, R. I. & P. R. Co. 36 Iowa, 458; Black v. Carrollton R. Co., 10 La. An. 33; Wood Mas. & S. 447, 448, s. 227. See Sullivan v. Union Pacific R. Co., 1 Cent. L. J. 595, opinion by Dillon, J., which is an exhaustive review of the whole subject. Damages are not to be given merely in reference to the loss of a legal right; they should be calculated in reference to a reasonable expectation of a pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased. Franklin v. S. E. R. Co., 3 H. & N. 211; Ihl v. 42d St. R. Co., 47 N. Y. (2 Sick.) 317; Kesler v. Smith, 66 N. C. 154; Pym v. G. N. R. Co., 2 Best & S. 759; Penn. R. Co. v. Bantom, 54 Penn. St. 495; Grotenkemper v. Harris, 25 Ohio St. 510; Dalton v. S. E. R. Co., 4 C. B. (N. S.) 296. So, under the English act, where it appeared, in an action by the father for an injury resulting in the death of his son, that the father was old and infirm, and the son young and earning good wages, and had assisted his father, and that the father had a reasonable expectation of pecuniary benefit from the continuance of the son's life, the court held that the action was maintainable. Field Dam. 507, citing Franklin v. S. E. R. Co., 3 H. & N. 211; Dalton v. S. E. R. Co., 4 C. B. (N. S.) 296; 27 L. J. R. C. P. 227.

But the prospective damages for the loss occasioned by the death of a child are usually limited to the period of minority. Field Dam. 508.

WEEKLY DIGEST OF RECENT CASES.

CALIFORNIA,	2, 7, 13, 22, 23
KANSAS,	1
KENTUCKY,	28
MASSACHUSETTS,	27
MINNESOTA,	14
NEBRASKA,	12
PENNSYLVANIA,	4, 8, 9. 11, 17, 18, 25
SOUTH CAROLINA,	16
WEST VIRGINIA,	3, 5, 6, 20, 24
VERMONT,	10
FEDERAL CIRCUIT,	15, 19, 21
CANADIAN,	26

1. CONSTITUTIONAL LAW—WARRANTS—PROBABLE CAUSE.

It is declared by section 15 of the bill of rights in the Constitution of the State of Kansas, that no warrant shall be issued to seize any person, but on probable cause supported by oath or affirmation; therefore a complaint or information filed in the district court charging a defendant with a misdemeanor and verified on nothing but hearsay and belief is not sufficient to authorize the issuance of a warrant for the arrest of the party therein charged, when no previous preliminary examination and no waiver of the right to such examination has been had. *State v. Gleason*, S. C. Kan. July 3, 1884; Judge's Head Notes.

2. CONTEMPT—INJUNCTION—CORPORATION.

The petitioner, who was president of a water corporation at the time when an injunction was granted and served on them prohibiting them from maintaining a dam in the channel of a certain water-course, resigned such office, left the corporation, sold his shares therein, and then purchased the property where said dam had been constructed, and proceeded to maintain the same. *Held*, that he was properly adjudged guilty of contempt. *Morton v. Sup. Ct. etc.*, S. C. Cal. Aug. 5, 1884; 4 Pac. Rep. 489.

3. CONTEMPT—JUDGMENT—REQUISITE.

The judgment in a proceeding against a party for a contempt of court need only express on its face, that it was a contempt generally; and the specific nature of the contempt need not be set out. *State v. Miller*, S. C. App. W. Va. March 29, 1884. Reporter's Advance Sheets.

4. CORPORATION—PUBLIC OR PRIVATE.

A company incorporated to carry on a grain elevator, and to issue warehouse receipts for grain, etc., is not a public corporation. *Grand Point etc. Co. v. Southwark Foundry*, S. C. Pa. Feb. 26, 1884; 15 W. N. C. 25.

5. CRIMINAL LAW—LARCENY—OWNERSHIP OF PROPERTY OF INTESTATE.

If a horse is owned by an intestate leaving a widow and infant children, and no administrator has qualified on his estate, and the horse remaining on his farm, and there has been no sale or distribution of the estate, but the horse as well as the children remaining on the farm under the widow's control, and while so under her control the horse is stolen, it may properly be described in an indictment as the widow's property. *State v. Heaton*, S. C. App. W. Va.; Reporter's Advance Sheets.

6. CRIMINAL PRACTICE—VENUE—FORGERY.

A jury is justified in inferring from the fact that a forged instrument is found in the prisoner's possession in the county where he sought to utter it, that the forgery was committed there. *State v. Poindexter*. S. C. App. W. Va. Apr. 19, 1884; Reporter's Advance Sheets.

7. DEED—DELIVERY TO THIRD PARTY.

Delivery to a stranger, for a third person, of an intended deed, of which delivery such third person is not informed, does not, by relation, when such third person accepts the deed, operate to defeat a right acquired under a judgment lien against the grantor between the time of delivery to the stranger and acceptance by the grantee. *Hibberd v. Smith* S. C. Cal. July 30, 1884; 4 Pac. Rep. 473.

8. ESTOPPEL—INCONSISTENT CLAIMS.

A claim of ownership by a landlord, of goods attached as his tenants' precludes him from afterwards claiming a lien for rent upon the proceeds of the sale of such goods. His claims are inconsistent. *Edward's Appeals* S. C. Pa. Mar. 24, 1884; 15 W. N. C. 23.

9. EVIDENCE—PEDIGREE—REQUISITES OF DECLARATIONS OF DECEASED PERSONS.

The rules of evidence applicable to pedigree cases are, 1st, that the statements must be made *ante litem motam*; 2d, declarants must be dead; but a prior condition to both these is, that it should be proved by some source of evidence, independent of the statement itself, that the person making the statement is related to the family about which he speaks. *Sitler v. Gehr*, S. C. Pa. Apr. 16, 1884; 41 Leg. Int. 328.

10. GIFTS—INTER VIVOS—TRUST—BANK DEPOSITS.

A direction by a bank depositor to the bank treasurer to pay the account to himself during life and after his death to B, such direction being made after the deposit does not operate as a gift, a declaration of trust in favor of B. *Pope v. Cushing* S. C. Vt. Reporter's Advance Sheets.

11. INSURANCE—FIRE—INCUMBRANCES—JUDGMENT—CONFESSION—BOND—NOTICE.

A bond with confession of judgment, which is entered of record is an incumbrance within the meaning of an insurance policy providing that if the premises should become incumbered by judgment, or otherwise, without notice to the company it should be void although he performs the condition of the bond and is not aware of the recording of the confession. *Hill v. The Penn. Mut. Fire Ins Co.* S. C. Pa. 15 W. N. C. 43.

12. JUDICIAL SALES—FAILURE OF OFFICER TO HAVE PROPERTY APPRAISED.

The failure of an officer holding an order of sale of real estate to have such property appraised is a mere irregularity, is not jurisdictional, and is cured by the order of confirmation. *Heligh v. Keene* S. C. Neb. Aug. 6, 1884, 20 N. W. Rep. 277.

13. MANDAMUS—JUDGMENT AGAINST COUNTY—DEFENSE.

A proceeding by mandamus is proper to compel a board of supervisors of a county to allow the amount of a judgment, and the defense that the payment of such judgment will result in incurring indebtedness exceeding the income of the then current fiscal year, cannot be set up in such proceeding; if it existed, it should have been interposed in the action in which the judgment was

rendered. *Johnson v. Supervisors*, etc. S. C. Cal. July 31, 1884; 4 Pac. Rep. 463.

14. LANDLORD AND TENANT—COVENANTS IN LEASE—ERASURE—CONSTRUCTION.
Parties prepared a lease upon a printed form. In the form was a covenant not to sublet without the lessor's written consent. Following the covenants were conditions, one reserving the right to re-enter in case of subletting without lessor's consent. Before executing they erased the clause containing the covenants, but left that containing the condition unchanged. *Held*, that the erasure of the covenant did not raise an inference that they intended the condition to be of no effect. *Pond v. Holbrook* S. C. Minn. July 10, 1884; 20 N. W. Rep. 232.

15. NATIONAL BANK—LIABILITY OF SHARE HOLDER—SURVIVAL.
The contingent liability of a share holder of a national bank is to be construed as a contract obligation and not as a penalty, and that it survives as against the representatives of his estate. *Jeans v. Mfg'rs Bank*, U. S. C. C. N. D. Ill. 16 Chic. L. N. 395.

16. NEGLIGENCE—MASTER AND SERVANT—NON-SUIT.
Where the only evidence offered by a plaintiff in a suit against a railroad company for the death of his intestate is that he was a brakeman, that while on the top of a cab, the bottom of his lantern fell out and the light went out; that he went down to get another, and while he was coming up, a water tank struck him and knocked him off the train, a non-suit was proper. *Davis v. R. Co.* S. C. So. Car. Apr. 14, 1884.

17. NEGOTIABLE PAPER—DEPOSIT IN BANK—NEGLECT TO APPLY TO NOTE—DISCHARGE OF INDORSER.
Where a bank is a holder of a note payable at the banking house, and upon maturity the maker has a deposit in excess of the amount of the note which deposit is not specially applicable to a particular purpose, the bank is bound to apply a part of said deposit to meet the note, and cannot elect to let the note go to protest and hold the indorser. Where such a course is taken the indorser is discharged from liability. *Commercial Nat. Bk. v. Henninger*, S. C. Pa. Apr. 11, 1884. 10 W. N. C. 33.

18. NEGOTIABLE PAPER—PROTEST—WAIVER.
The words "protest waived" include waiver of demand and notice. *The Aunville, etc. B'k. v. Kettering*, S. C. Pa. May 19, 1884; 41 Leg. Int. 329.

19. PRACTICE—WANT OF JURISDICTION—COSTS.
Where a case is dismissed for want of jurisdiction of the subject of the action, the court cannot render judgment for the costs of the suit. *Pentlarge v. Kirby*, U. S. C. C. S. D. N. Y. July 15, 1884; 18 Rep. 228; 20 Fed. Rep. 898.

20. PRESUMPTION—RECENT POSSESSION OF STOLEN PROPERTY.
The presumption arising from exclusive possession of recently stolen property is one of fact, not of law, and the court has no right to charge the jury concerning the same. *State v. Heaton*, S. C. App. W. Va.; Reporter's Advance Sheets.

21. SALE BY AGENT TO PRINCIPAL—WORTHLESS BONDS OF A STATE.
If an agent, in response to his principal's order to purchase for him certain bonds, purchases such from himself (he having received them in part payment on an individual contract for the delivery of iron) and charges his principal with them thus: "To bot. $100,000 6 per cent. North Carol. Bonds, $63,125,"—retaining them in his own possession and manifesting acts of ownership concerning them, in the event of the bonds being subsequently declared void by the highest court in North Carolina, the loss should fall on the agent, even though he had no intention to defraud. *Bischoffsheim v. Baltzer*, U. S. C. C. S. D. N. Y. July 17, 1884; 20 Fed. Rep. 890.

22. SHERIFF'S SALE—TITLE—RETURN OF WRIT—DEED.
The title of a purchaser at a sheriff's sale does not depend on the return to the writ; he cannot be prejudiced by its terms, whether good or bad, sufficient or insufficient. The title acquired by the deed of the officer relates back to the date of the judgment, and not to the date of any real or pretended statutory levy. *Hibberd v. Smith*, S. C. Cal. July 30, 1884; 4 Pac. Rep. 473.

23. TAXATION—EXEMPT PROPERTY—FRUIT TREES—"GROWING CROPS."
Fruit trees are not "growing crops" in the meaning of a constitutional provision exempting such crops from taxation. *Cottle v. Spitzer*, S. C. Cal. July 26, 1884; 4 Pac. Rep. 435.

24. TRUST—CONDITION FOR SUPPORT IN DEED—ENFORCEABLE BY EQUITY—SALE OF LAND.
If land be conveyed to a grantee subject to the support of a certain man and wife not parties to the deed during their lives, which support the deed declares is to be attached to the land conveyed and to be a lien upon it, this express trust will at the instance of this man and his wife be enforced by a court of equity, if the support is not furnished to them; and, if necessary, the land will be sold to furnish such support and to pay what such support was worth during the time the grantee neglected to furnish it. *Johnsons Ad'm'r v. Billups* S. C. App. W. Va. March 19, 1884; Reporter's Advance Sheets.

25. WILL—CONSTRUCTION—ABSOLUTE DEVISE OR BEQUEST OF INCOME.
A bequest of a sum to the testator's son, the interest to be paid annually to him by the executrix, she to be his trustee as to that bequest, is an absolute gift of the same, and upon the death of the testator, the son having before died, the son's widow is entitled thereto, under the laws of the State. *Sproul's Appeal*, S. C. Pa. March 10, 1884; 41 Leg. Int. 314.

26. WILL—CONSTRUCTION—BEQUEST WITH DEVISE OVER.
A bequest of different lots to each of the two daughters of the testator, "and if either of my daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister," gave them a fee simple, with an executory devise over. *In re Winstanley* Can. H. Ct. Ch. Div. June 14, 1884.

27. WILL—CONSTRUCTION—DEVISE—FORM ON HAPPENING OF CONTINGENCY.
A devise to B, in trust for C, for life and if he died "without wife or children" over to D and E, gives C an implied power of disposition after his death, except in the contingency named and it was not

necessary that he should die leaving both wife and children to defeat the devise over. *Rhodes v. Rhodes* S. J. C. Mass. Mass. L. Rep Aug. 14, 1884.

28. WILL—MARRIED WOMAN.

A will executed by a married woman during the life of her husband but, subsequently, after his death, admitted by her to be her will, is valid. *Porter v. Ford*, Ky. Ct. App. June 19, 1884; 8 Ky. Ct. App. 60.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

28. How should the courts of a State construe a devise of the remainder of an estate (real) to the "right heirs" of the testator, with reference to property within its jurisdiction, when the will is made in another State, where property of the testator also lies, when the construction of the term "right heirs" differs in the courts of the States, will the former adopt that followed in the latter?

CHI PHI.

Savannah, Ga.

29. Is the appointment of a receiver properly made, under suitable circumstances (as where its property is in imminent danger of being wasted or destroyed and the corporation dissolved because of probable suits against it by its creditors in default of interest on its bonded indebtedness) upon the application of a debtor corporation? Can any one give us an instance?

T. Z.

Kalamazoo, Mich.

30. A is a young, ignorant woman, an heir to interest in a tract of land in Missouri; she lives in Illinois. B, her attorney and confidential agent, is employed by a town company to buy her interest in this tract. It is worth $50,000; pays $200 for a quit claim through false representations of the value of the land. Prior to their obtaining a quit claim deed from A, the town company has made waranty deeds to purchasers of town lots. They did not have the entire and perfect title when the said deeds were made. Can the quit claim from A obtained in the manner stated revert and make good those deeds? Cite authority. D.

Carthage, Mo.

31. Can the trustees of a seminary mortgage the building and grounds for the purpose of obtaining money for the purpose of building additions on the college grounds or seminary grounds?

Orleans, Neb. J. L. ROBERSON.

32. A railroad company constructs its road through A's land without objections from A, but without grant of right of way in proceedings of condemnation; afterwards A sells the tract of land to B. Can the latter recover in ejectment, or can he institute condemnation proceedings to recover damages, the statute authorizing such proceedings upon the part of an owner? P.

33. A gives to B a mortgage on his tract of land. Subsequently A grants by deed duly recorded a right of way through said tract to a railroad company. After the company has fully constructed its road B forecloses his mortgage by proceedings against A only, not making the railroad company a party, and under the decree of foreclosure, C buys the tract including that part over which the railroad is constructed. How are the rights of the company affected, and what, if any right does C acquire against it? Cite authorities.

Y.

34. One private corporation buys, (without any statutory authority) all the stock and shares of another corporation, then issues to five of its stockholders, shares to qualify them as directors of the purchased corporation, and by this means attempts to keep up two corporations, nothing is paid by the members for this stock and it was understood that the stock was held as the property of the purchasing corporation. A obtained a judgment against the purchasing company and levies it on the property which formerly belonged to the sold out company, which property was claimed by the sold out company, by these five directors, and a bond and affidavit was given to try the rights of property. Now the question is, was this property subject to A's execution? A. M. C.

QUERIES ANSWERED.

Query 21 [19 Cent. L. J. 137.] A is an agent with power to sell a particular article, but has no authority to collect. B is A's principal. A sells one of the articles to C, and without authority takes C's check, payable to B's order, for amount of purchase price. A then gots to D with check, and in his presence endorses it, B, per A, and D discounts the check. A had no authority to endorse. Is A guilty of forgery?

Detroit. M. B.

Ans. 1. Where one signs an instrument with his own name, claiming it on the face of the instrument to be per procuration of the party claimed to be represented, the act is not forgery, but merely a false assumption of authority. State vs. Wilson, 12 Rep., 85, S. C. Minn., May 26, 1881; 2 Bish. Crim. Law, 6 ed. § 582.

JAMES H. BROWN.

Denver, Col.

Ans. 2. A is not guilty of the crime of forgery, Regina v. White 1 Den. C. C. 208. Sec. 27, 32, 33, Vic. C. 19 was passed to cure this defect in the common law. See 2 Russ on Crimes 941 n. EDWARD P. PIERCE.

Fitchburg, Mass.

Ans. 3. The fact that A had no authority to receive the check does not seem to cut any figure in determining whether this was forgery. Bishop and Wharton both lay it down, upon the authority of English cases, that an endorsement purporting to be made by an agent, but having no authority to endorse, is not a forgery. 2 Bush. Cr. Law. § 582; 2 Whart. Cr. Law, § 1431. *In re* Tully, 20 Fed. Rep. 812.

B.

Query 23. [19 Cent. L. J. 157.] Is a train dispatcher who has supreme control over the running of trains, a fellow servant with a brakesman who was bound to obey the orders of the train dispatcher? G.

Ans. Assuming that the word "Supreme" is used in some sense consistent with the idea that the train dispatcher is a servant of the railroad company, and that the word "bound" as used does not imply physical compulsion, G. will find his question answered affirmatively in Robertson v. Terre Haute & I. R. R. Co., 78 Ind. 77; S. C. 41 Am. Rept. 552.

LAYMAN.

Brookhaven, Miss.

RECENT LEGAL LITERATURE.

RORER ON RAILROADS. A treatise on the Law of Railways. By David Rorer of the Iowa Bar. In two volumes. Chicago, Ill., Callaghan & Co., 1884.

The author of this treatise was no stranger to the profession at the time he wrote it. He had already felt the pulse of the profession, and he found it decidedly favorable. For this reason, he assures us in his preface, that he again essayed upon the field of legal authorship, and produced a book which in many respects will preserve his name as an object of veneration by the profession. He is no longer in this world, and, doubtless, the general verdict will be, that he closed his earthly labors with credit. We hope so, for the old judge certainly deserved success.

Every one has his prejudices nowadays on the subject of railroads. He is for them or against them. It would seem that an author might carry his prejudices on such a subject to such an extent that it would injure the book, as an authority. In the treatise before us, while some zealous critic might here and there find some statements indicating a leaning towards the railroad interests, they are upon matters which are matters of argument, and so far as we have been able to observe, there is no visible effort to state the law in the interest of any one, except those who are expected to purchase it. We have examined it a little more closely in this regard, than we would otherwise have done, for the reason that we understood from a source not altogether reliable, that the treatise was written from a prejudiced standpoint. Whatever may have caused this suspicion, we see nothing to support the charge, and there is very little danger in these days of profuse and rapid book-making, of the acceptance of the *dicta* of authors, even if courts do accept the statements of the author as to the law, which cannot be misstated.

The composition of the book is excellent. The style is clear and forcible, and indicates a strong capacity in the author for legal writing. Far from being "padded," we should be inclined to believe that the treatment is too compact, but the profession nowadays enter little complaint against any tendency in that direction. Each chapter by itself is a master-piece of legal writing, but the arrangement of the sixty-six chapters is different in some respects from what we would adopt. It is, of course, reasonable to concede that an old author who has studied a great subject, and pondered over it for two years, perhaps, is better qualified to pass upon the matter of arrangement, than one who has only the ordinary professional familiarity with the subject. We all know that different ideas as to arrangement may be honestly entertained, and sustained with argument which can equally withstand the test of logic. At first, we had supposed that in a few places, the arrangement of this treatise might be subjected to some objection, but the two facts we have mentioned, have deterred us from making any criticism which might seem unjust, or inspired by improper motives. We are disposed to be impartial in all our reviews, yet we feel that the work of an author, which has been the results of painstaking labor, should not be wantonly or recklessly criticised. The arrangement of chapters when not reckless or ignorant is not a proper subject for prominent criticism, when the rest of the book is so commendable for its excellence.

Two or three matters of arrangement might be noticed, but to cite them would merely illustrate different ideas of arrangement What one may consider very faulty, others equally capable would commend. But it is the statement of the law, which is to be observed. That is unobjectionable; more, it is of that quality which proves beyond doubt, a thorough understanding of the subject. We would not have the slightest trouble in finding just what we wanted, but some have the idea that the arrangement is the *desideratum* in a treatise. Furnish us with a good index, and and "we would not care a whit" for the arrangement. This treatise is provided with such an index. We never knew Callaghan & Co. to attempt to palm off on the profession an imperfectly executed book from a mechanical standpoint, and it is, therefore, needless to say, that they have done their share of the joint duty of author and publisher.

AMERICAN REPORTS. The American Reports, containing all decisions of General Interest decided in the courts of last resort of the several States, with notes and references by Irving Browne. Vol. xlvi, containing all cases of general authority, in the following reports, 71 Ala., 106 Ill., 89, 90, and 91 Ind., 60 Iowa, 30 Kans., 75 Me., 135 Mass., 77 Mo., 94 N. Y., 59 Tex., 14 Tex. Ct. App., 77 Va., 16 Vr. (N. J.) 22 W. Va., 57 & 58 Wisconsin. Albany, John D. Parsons, Jr. 1884.

The abbreviations are ours. From this report we learn that a fire insurance policy may be enforced, although the insured himself burned the property when insane. Karow v. Ins. Co., 57 Wis. 56; that it is error to permit an expert to be asked what "the facts as sworn to by the witnesses indicate" and that the capacity to plan a homicide does not imply sanity; Bennett v. State, 57 Wis. 69, that one partner may with the consent of his copartner, have an exemption out of the firm assets; O'Gorman v. Fink, 57 Wis. 649; that an agreement made by a prisoner not to sue the prosecutor for false imprisonment, if he will release him is void; Guilleaume v. Rowe, 94 N. Y. 268; that a railroad has no right to use a street without offering compensation to the abuttors, R. Co. v. Rodel, 87 Ind. 128; that it is not negligence for a railway engineer to remain at his post in the face of an impending c llision, Pa. Co. v. Roney, 89 Ind. 453. One of the cases well illus-

trates the tricks or "rackets" of the thieves. C was seated in a train with G, a stranger, but very sociable, and S, pretending to be an express agent, entered, told G he would have to pay for sending his baggage to Cincinnati. G said he had no cash, but offered S a check. Upon his refusing it, C is induced to cash the check, G promising to take it up at Cincinati. G and S disappear soon after, and it appears that this was all a "put-up-job" to fleece the countryman, C. C. however, has the satisfaction of knowing that the Supreme Court of Indiana holds the tricksters both guilty of larceny. Grunson v. State, 89 Ind. 533. To report for gain that a juror can be bribed is a contempt of court. Little v. State, 90 Ind. 338. The doctrine of imputable negligence is not upheld in Texas, R. Co. v. Moore, 59 Tex. 64. Dogs, it seems, are not "domestic animals," State v. Harman, 75 Me. 562. Going upon a steam car platform while in a fit of somnambulism, and falling off is not a "voluntary exposure," within the meaning of an insurance policy, nor were there any "self-inflicted injuries." Scheiderer v. Ins. Co. 58 Wis. 13. There are many very valuable notes to cases in this volume. Irving Browne is no sloven at work. His head notes are models of conciseness, and he always manages to express all there is in the case, in a few words. Th· annotations are quite exhaustive. This is a valuable series of reports; no practitioner with business justifying the expense of purchasing them should be without them.

LEGAL MISCELLANY.

IS ADVISING SUICIDE MURDER?

The record of a trial which took place in Massachusetts, half a century ago, and which has lately been dragged into the light, seems to afford ground upon which to build a hope of reform. A man by the name of Jewett was convicted at Northampton of the murder of his father and sentenced to be hanged. One of his prison companions, Bowen, urged him to escape the disgrace of the gallows by committing suicide. Jewett listened, was persuaded, and on the night before the day when the sheriff was to place "the fatal noose" about his neck he hanged himself from the grate of his cell. These facts coming to the attention of the law officers, Bowen was indicted for murder. On the trial that followed the court decided—and this is the point of general current interest and value—that if Bowen's advice procured the death of Jewett the former was guilty of murder. Bowen escaped for the reason, says *The Boston Herald*, in which we find an abstract of the report of the trial, that the jury thought there was a doubt whether his advice was in any measure the procuring cause of Jewett's death.

The decision of the court would seem to be sound. We are not aware that it ever was reversed. What is needed, however, is the ruling of the Supreme Court of the United States on the point. Such a ruling, provided it sustained the Northampton judge, would meet a great popular want. Let it once be settled that he who drives his fellow man to suicide must die, and it will be easy to procure the enactment of related laws properly punishing such as half kill or quarter kill or drive to distraction or are responsible or nervous headaches. Very likely the bores are destined, like the poor, always to be with the world. But holding fast to the hand of this worthy Massachusetts judge, we feel warranted in asserting that if the judiciary does its whole duty it ought to be possible to get rid of a good many, and the most abandoned of them. Let a case be made up and placed upon the preferred calendar.—*Ex.*

THE DOCTRINE OF RES GESTÆ.

Professor Greenleaf has long been the standard writer on evidence in this country, the authority alike of student, practitioner and judge. He is not by any means free from faults, even as "polished" by a surviving relative. Respecting the explanation which he gives of the doctrine of *res gestæ*, Lord Cockburn recently said:

"On turning to Professor Greenleaf's work I am met at (section 107) by a fine philosophical flourish, in which I am told that 'the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other;' that 'each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others.' 'Each' continues the philosophic writer—the profundity of thought deepening as he advances—'having during its existence its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature.' Having pondered with befitting reverence on the profound train of thought involved in these high sounding and far reaching phrases, I come back to the question of '*res gestæ*,' and I read on: 'These surrounding circumstances,' continues the learned author, here lapsing from the lofty region of the philosophical abstraction to the practical and more common place ideas of the jurist, 'may always be shown to the jury, along with the principal fact, provided'—provided what? Why that—'they constitute parts of what are termed the *res gestæ*.' To which is added that 'whether they do so or not must in each particular case be determined by the judge in the exercise of his sound discretion, according to the degree of relationship which they bear to the principal fact.' So that, as regards the meaning of *res gestæ*, we are here entirely at sea again. Till I came to the proviso, I thought I had begun to have some notion what *res gestæ* meant. I try it by its application to an every day case. As I am walking along the street, a thief takes my purse from my pocket. I have to bear in mind that the theft will be attended with a 'complication of circumstances,' and 'will owe its birth to preceding circumstances,' and 'in its turn will be the prolific parent of others.' Thus, the theft being the principal fact, 'the preceding circumstances' will, I presume, be that I was in the street with my purse in my pocket and was not sufficiently alive to the danger of having my pocket picked, or was perhaps too sensible of the danger of being run over by a cab, to which Her Majesty's subjects passing along the streets of this metropolis are hourly exposed, to see to the protection of my pocket. Next comes the fact that the thief, by a long train of other 'preceding circumstances,' had taken to the picking of pockets as a convenient and easy mode of gaining his livelihood and leading a luxurious life. Next come

the circumstances of which the thief is 'the prolific parent.' I become aware that my purse is gone. I see the thief running away. I call out to a policeman, telling him that I have been robbed by the man who is disappearing in the distance. The policeman hastens in pursuit, and being a more than usually active policeman succeeds in overtaking and capturing the thief. The thief is taken to the station, and afterward committed for trial at the Central Criminal Court, and there tried and sentenced to an appropriate, and I hope, sufficient punishment, so that he will abstain from picking pockets in future, or, at all events, if he sees me in the street again, he will keep his hand out of my pocket, though it may be at the expense of somebody else's. Lastly, the prosecution cost me more than the amount I had in my purse. The 'inseparable attributes' and 'kindred facts' connected with the taking of the purse—may be that the thief, in order to effect his purpose, knocks me down or trips me up, or pushes my hat down over my eyes or holds my hands while helping himself to my purse. Thus far I have no difficulty in seeing that the circumstances attending the original transaction form part of the *res gestæ*. But what if the stout and heavy policeman, having failed to catch the light-footed, as well as light-fingered thief, I give him on his return, out of breath, a full and correct description of the criminal? Or suppose that not seeing a policeman, and being myself too old or heavy to pursue the nimble thief, and the latter having consequently escaped, I see a friend in the street, and seeking consolation in venting my griefs to him, I state to him all the circumstances of the transaction, including a description of the thief—would either of these circumstances form part of the *res gestæ*? In the improved text books to which I have turned for information all that I find laid down is that such statements will be admissible if forming part of the *res gestæ*; but as to what is to be understood as comprehended in this uncertain term, I am left as much in the dark as I was before. Instead of finding any rule for my guidance I am told that it is a matter for the judge to determine according to his sound discretion."

Even when we were at school we did not think the professors the clearest thinkers or the most forcible reasoners in the world—particularly when they launched out into a discussion of the "elements" of the Greek verb. Many of them were tedious, others tiresome, and others still were "windy." If the foregoing elucidation were to be ranged under either of these classes it would properly fall within the last. After reading this one is tempted to give credence to the report that the professor's pupils had a hand in the production of his work.—*American Law Journal.*

CONVINCING A JURY.

To gain a jury's confidence one need not favor and flatter them, or beg a verdict, or try to gain favor by boasting that he knows them by name, or that they are great business men or plain farmers, and the like. A better way is to earn their confidence by a full clear statement and adhering to the merits unobscured by rubbish and little trifles that clog and hinder and never produce any real result in arriving at a verdict.

Men are convinced by fairness, repelled by underhand tricks, and led with the sense of justice that they will expect for themselves. To illustrate:—A carpenter sued for extra work and made out his bill in items. Defendant pleaded payment but showed some uncertainty in dates and accounts. The builder brought his dusty old memorandum book in pencil, with day and date for every item. He was very confident it could not deceive him. Figures don't lie, he said to the jury. Counsel followed with this reference to the entry:—"If two men weigh grain and one of the two tallies each hopper full as they fill it, while the other trusts to his memory, no one would doubt but the man who kept tally would be most reliable. If two men traveled to Europe and one kept a mile book, in which he marked each day's miles made on the journey, eleven days out, no one would question but he was safer authority than the one who attempted to remember eleven days with eleven odd numbers. If I have a diary of the weather for six years every day in every year, I am far safer to speak of the fine days and rainy days of each season than one who guesses at it. So in honesty and justice, tally sheets tell the whole story better than many witnesses. Men forget, books remember all that is committed to their keeping. Memory is uneven, treacherous uncertain, marks remain changeless. They are made without motive to falsify, they must be truthful." This is simple. Yet to a layman is clear common sense, and they act upon it. The jury feels a sympathy with the right side. They prefer to end a controversy according to duty and equity. They often do better than the court's instructions. They strain a point to help out a feeble case for a deserving client. What would you have done? is one of the grandest of reasons in civil and criminal cases. In Tom Marshall's defense of Matt Ward, for shooting Prof. Butler in Louisville before the war, in one brilliant passage he said:—What would you have done? What would you have him do under the circumstances? Stand like a coward or defend himself? And Gov. Crittenden, following in the same strain, added (for Ward was not defending himself but his brother):—"The law of self-defense is not so narrow. I am not to defend myself and be forced to stand by and see my wife, my child, my helpless ones destroyed. No, gentlemen, if I had no greater liberty than that, I would raise my own wild hand and take this life and hurl it back in the face of my Maker as a thankless gift."

Here was the touch of nature that made all Kentuckyans kin, and won a verdict of acquittal. The jury will do right if they can. So that in criminal cases, hotly contested, where, for example, the defence is a home destroyed, all that counsel has to do is to produce that innate sense of justice, rouse the manhood, and say what you would do under the circumstances? to produce the result and secure the acquittal. I remember two more instances, one small, one large, in importance. The first was, the shooting of a New Foundland dog in his master's door-way by an excited father who had just rescued his son's bleeding arm from the monster's jaws, and in the heat of passion shot the animal dead, without reflection of when or where. In his evidence on the trial, he said: "I could not help it. I would do it a thousand times, gentlemen. You could not help it. The cry of my boy was like a dagger in my heart. I had to do it!"

The other instance was of a newly-married man, who returned home partly intoxicated and saw through the window a young man acting very familiar with his wife. He hurried in, and was met with a laugh that he did not relish. He ordered the intruder out, and both he and the wife laughed all the louder. He seized the strange man by the arm but he was much too strong to be so handled. This was all done quickly. Turning, he took a piece of stove-wood and felled the man dead at one blow. It was his wife's own brother! But he said: I could not help it, gentlemen. It was a dreadful trial. I was goaded to the heart. It was my impulse. I was defending my home! Nothing gets nearer to a jury than such reasoning.—*American Law Journal.*

LEGAL EXTRACTS.

AN ORIGINAL DECISION.

Calloway county has an original magistrate. A man was recently brought before him charged with stealing a hog. His honor had a very small personal opinion of the prisoner, and was seen to shake his head ominously and frown portentiously during the proceedings. The prisoner succeeded in establishing an alibi, and his attorney told him to go about his business. "Hold on, Bill Smith!" roared his honor. "I've got a thing or two to say to that!" "This here prisoner stands committed to jail. I know the evidence fails to convict him of stealing Bill Simonse's hog, but the durn cuss, I make no doubt, has hitched on to some other feller's pork in the past, and if he has not done so in the past he is just that rotten mean that he will steal somebody's hoss or hog sometime or other, and I think it is my duty to cage him." "But, your honor," said the prisoner's lawyer, "my client has proved an alibi!" "I don't keer for your alibis or any other rigmarole, this man must be caged." "I'll sue out a writ of quo warranto and mandamus, and shame you with a writ of habeas corpus!" yelled out the attorney. "You may quo warranto until you're blind, and mandamus, or any other damus, until you're dumb and dig up all the corpses in the county, but you can't move this court!" thundered the judge. "Mr. Constable, the prisoner stands committed!"

BELIEVED HIM GUILTY.

The Superior Court was in session in one of the lower counties of the Circuit, and the Solicitor, with the counsel for the defense, was engaged in the selection of a jury for the trial of a man charged with murder. As usual, in such cases, some difficulty was experienced, and the Court was getting tired of the tedious proceedings. "Call the next juror, Mr. Clerk," said the Solicitor for the hundredth time. The Clerk called, and an old man, with an honest face and a suit of blue jean clothes, rose in his place, and the Solicitor asked the following customary questions: "Have you, from having seen the crime committed, or having heard any of the evidence delivered under oath, formed or expressed any opinion as to the guilt or innocence of the prisoner at the bar?" "No sir." "Is there any bias or prejudice resting on your mind for or against the prisoner at the bar?" "None, sir." "Is your mind perfectly impartial between the State and the accused?" "It is." "Are you opposed to capital punishment?" "I am not." All the questions had been answered, and the Court was congratulating itself on having another juror, and the Solicitor, in solemn tones, said: "Juror, look upon the prisoner; prisoner, look upon the juror." The old man adjusted his spectacles and peeringly gazed at the prisoner for full half a minute, when he turned his eyes toward the Court and earnestly said. "Judge, I'll be condemned, if I don't believe he's guilty!" It is useless to add that the Court was considerably exasperated at having lost a juror, but the more humorously inclined had a good laugh at the old man's premature candor.

PISCATORY.

In the current number of *Every Other Saturday*, Mr. Benjamin R. Curtis describes a day's fishing at Mount Desert, in company with the late Chief Justice Chapman of this State and the late Hon. William T. Bates of Westfield. This anecdote is from the entertaining account: When the host had about completed his arrangements for the day and while the yacht was thumping impatiently against the wharf, the last two-mentioned gentlemen (the Chief Justice and Mr. Bates) came in sight over the top of a neighboring hill. Both were evidently very carefully arrayed for a day's fishing, and both were carefully protected by large sun umbrellas, but while Lawyer Bates was striding easily and calmly along with his lengthy limbs, the Chief Justice was puffing and blowing in a very audible manner, and was compelled every little while to stop and lower his umbrella, and mop his brow and head with a large silk handkerchief. At length they reached the wharf, and came on board the yacht. After a pleasant run down the harbor we anchored off the fishing grounds, and at once proceeded to business. I was just about to bait my hook and pitch it overboard, when my attention was attracted by an unusual stillness pervading the stern of the boat. Looking up, I beheld the Chief-Justice carefully taking the cover from a large box of mutton-tallow, which he held in his hand, while Lawyer Bates sat in deep silence, regarding him with unbounded astonishment and musement. Witho ut a word the Chief-Justice proceeded to dip his hand into the tallow and rub it in great lumps over his face and forehead. Again and again he repeated the operation, until his round countenance shone and almost dripped with the unusual anointing. At length shutting the box, he handed it to his neighbor, remarking pleasantly and quite as a matter of course, "Bates, will you grease your nose?" Stretching out his long, thin arm, and taking the box, the lawyer gazed into it grimly for a moment, and then dryly replied: "May it please your honor, if the court rules that mutton tallow is competent for the purposes of this inquiry, the bar must submit; but, before I change my skin like the chamelion, I should like to have your honor note my exception, and I am further pleased to remark that, in case of any differences of opinion on the part of your associates, there will be plenty of this tallow left in the box to bring the rest of your honorable bench to your own *fac(e)-ile* condition." "Ah! Bates," said the Chief Justice, skilfully lowering a well-baited hook, "I always thought you were a slippery fellow. I shall report the case to the full bench, and when you appear before us in the autumn we will commit you for contempt of court." But at this moment the Chief Justice declared that he had "got a bite," and further conversation was suspended to give the court time to pull in its fish, while the bar greased its nose.

NOTES.

A LEGAL BENEDICTION.

"Light lie the sculptured marble o'er his breast
Blaz'd be his virtues and his sins suppress'd,
And, wheresoe'r his bones are laid,
Thrice honor'd be that lawyer's shade,
Who Truth with Nonsense first combined,
And Equity with fiction joined."

—*The Pleader's Guide:* By the late JOHN SURREBUTTER.

——The story is told of Walter Davidge, that in a Washington court room he had hardly been able to restrain himself through two hours of a tedious speech by an opposing lawyer. At last the lawyer said: "Your Honor, I have an idea." "Your Honor," broke in Davidge' "give him a writ of habeas corpus take it out of solitary confinement."